IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs September 17, 2008

STATE OF TENNESSEE v. RONNIE OWENS

Direct Appeal from the Criminal Court for Davidson County
Nos. 2004-B-1436 and 2004-D-2545 Cheryl A. Blackburn, Judge

No. M2007-02578-CCA-R3-CD - Filed October 21, 2008

The Defendant pled guilty in September 2005 to two counts of possession of a Schedule II drug with the intent to sell. The trial court sentenced him to an effective sentence of eleven years, with one year to serve in jail followed by ten years in a community corrections program. In October 2007, the trial court found that the Defendant had violated the terms of his community corrections sentence, and it re-sentenced him to serve an effective total sentence of sixteen years in the Tennessee Department of Correction ("TDOC"). The Defendant now appeals, claiming that the trial court erred in increasing the sentence to sixteen years and ordering the Defendant to serve the sentence in TDOC. After a thorough review of the record and the applicable law, we affirm the trial court's judgments.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and J.C. MCLIN, JJ., joined.

Nathan Moore, Nashville, Tennessee, for the Appellant, Ronnie Owens.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Sophia S. Lee, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; Robert E. McGuire, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Facts

In May 2005, the Defendant entered guilty pleas to two drug offenses and received an effective sentence of eleven years, with one year to be served in jail and ten years to served in community corrections. In August 2005, the trial court held a hearing and found the Defendant had failed to report for jail as ordered. As a result, it increased his effective sentence to fourteen years. In March 2007, the trial court found the Defendant violated the terms of his community corrections sentence yet again, and it ordered him to serve ninety days in jail while also completing a rehabilitation program. In October 2007, the trial court held a third hearing to determine if the Defendant violated the terms of his community corrections sentence by failing a drug test. At the community corrections revocation hearing the following evidence was presented: the Defendant admitted he violated the terms of his release into the community corrections program. He stated that he had suffered from a "drug problem" for twelve years. The Defendant testified that he began smoking marijuana at age fourteen and using cocaine at age seventeen. He conceded that he was an addict and said that he "just want[s] to live normal[ly]." The Defendant said he would live with his mother if he was released from jail.

On cross-examination, the Defendant acknowledged that he pled guilty to attempted aggravated robbery in March 2001 but subsequently violated the resulting community corrections sentence by not reporting. He also said that in January 2004 he and another person sold cocaine to undercover police officers and that he had 28.5 grams of powder cocaine and 10 grams of crack cocaine on him. The Defendant verified that he "had the bulk of the drugs in his hotel room." This arrest gave rise to case number 2004-D-2545. After released on bond, the Defendant was arrested again for selling cocaine in case number 2004-B-1436. The Defendant admitted his current violation was his third violation of the terms of his release. Additionally, the Defendant failed to attend a particular drug rehabilitation program as the trial court had specifically ordered.

Robert St. John, an employee at the Samaritan Recovery Community Alcohol and Drug Addiction Treatment Center, testified that the Defendant was a potential candidate for the program. He said that in order for Samaritan to accept the Defendant, he must be released into the community. The facility would not accept him directly from jail. St. John stated that Samaritan had a residential phase and a transitional living phase for its participants.

After considering the evidence presented, the trial court found the Defendant violated the terms of his community corrections sentence, revoked the community corrections sentence, and re-sentenced him to serve an effective sentence of sixteen years in TDOC. It is from this judgment that the Defendant now appeals.

II. Analysis

On appeal, the Defendant argues that the trial court erred when, after revoking his community corrections sentence, it increased the length of the Defendant's effective sentence from fourteen to

sixteen years, and it ordered that the sentence be served in TDOC rather than community corrections once again.

A. Revocation of Community Corrections Sentence

The Defendant conceded that he had violated the terms of his community corrections sentence. A trial court may revoke a defendant's community corrections sentence based on the defendant's conduct and whether the defendant abided by the conditions of the community-based programs. T.C.A. § 40-36-106(e)(3)-(4) (2006). Such a decision is within the trial court's discretion, and this court will not disturb a trial court's revocation judgment unless there is "no substantial evidence" that a "violation of the conditions of [the community corrections program] has occurred." *State v. Harkins*, 811 S.W.2d 79, 82-83 (Tenn. 1991) (citing *State v. Grear*, 568 S.W.2d 285, 286 (Tenn. 1978); *State v. Delp*, 614, 614 S.W.2d 395, 398 (Tenn. Crim. App. 1980)) (adopting the probation violations standard for a community corrections program violation due to the sentences' similar nature). In other words, the trial court must find proof of a community corrections violation by a preponderance of the evidence. T.C.A. § 40-35-311(e) (2006); *State v. Joe Allen Brown*, No. W2007-00693-CCA-R3-CD, 2007 WL 4462990, at *3 (Tenn. Crim. App., at Jackson, Dec. 20, 2007), *no Tenn. R. App. P. 11 application filed*. We note that "only one basis for revocation is necessary," and a defendant admitting that he violated the conditions of his release to the community corrections programs is sufficient evidence for such a revocation. *Brown*, 2007 WL 4462990, at *3 (quoting *State v. Alonzo Chatman*, No. E2000-03123-CCA-R3-CD, 2001 WL 1173895, at *2 (Tenn. Crim. App., at Knoxville, Oct. 5, 2001), *no Tenn. R. App. P. 11 application filed*.) (citing *State v. Johnson*, 15 S.W.3d 515, 518 (Tenn. Crim. App. 1999)). Therefore, we conclude the trial court properly revoked the Defendant's community corrections sentence.

B. Resentencing of the Defendant

If the trial court revokes the defendant's community corrections sentence, then it may "resentence the defendant to any appropriate sentencing alternative, including incarceration, for any period of time up to the maximum sentence provided for the offense committed, less any time actually served in the community-based alternative to incarceration." T.C.A. § 40-36-106(e)(4). The Supreme Court has said that "the sentencing of a defendant to a community based alternative to incarceration is not final, but is designed to provide a flexible alternative that can be of benefit both to the defendant and to society." *State v. Griffith*, 787 S.W.2d 340, 342 (Tenn. 1990). Moreover, a "defendant sentenced under the [Community Corrections Act] has no legitimate expectation of finality in the severity of the sentence, but is placed on notice by the Act itself that upon revocation of the sentence due to the conduct of the defendant, a greater sentence may be imposed." *Id*.

In this case, the Defendant challenges both the length (sixteen years) and the manner of service (TDOC) of the sentence imposed by the trial court following the revocation of the

community corrections sentence. When a defendant challenges the length, range or manner of service of a sentence, this Court must conduct a *de novo* review on the record with a presumption that "the determinations made by the court from which the appeal is taken are correct." T.C.A. § 40-35-401(d) (2003). As the Sentencing Commission Comments to this section note, the burden is now on the appealing party to show that the sentencing is improper. T.C.A. § 40-35-401, Sentencing Comm'n Cmts. This means that if the trial court followed the statutory sentencing procedure, made findings of facts which are adequately supported in the record, and gave due consideration and proper weight to the factors and principles relevant to sentencing under the 1989 Sentencing Act, T.C.A. § 40-35-103 (2006), we may not disturb the sentence even if a different result was preferred. *State v. Ross*, 49 S.W.3d 833, 847 (Tenn. 2001). The presumption does not apply to the legal conclusions reached by the trial court in sentencing a defendant or to the determinations made by the trial court which are predicated upon uncontroverted facts. *State v. Dean*, 76 S.W.3d 352, 377 (Tenn. Crim. App. 2001); *State v. Butler*, 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994); *State v. Smith*, 891 S.W.2d 922, 929 (Tenn. Crim. App. 1994).

In conducting a *de novo* review of a sentence, we must consider: (1) any evidence received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing, (4) the arguments of counsel relative to sentencing alternatives, (5) the nature and characteristics of the offense, (6) any mitigating or enhancement factors, (7) any statements made by the defendant on his or her own behalf and (8) the defendant's potential or lack of potential for rehabilitation or treatment. *See* T.C.A. § 40-35-210 (2006); *State v. Taylor*, 63 S.W.3d 400, 411 (Tenn. Crim. App. 2001).

When deciding whether to sentence a defendant to confinement, a trial court should consider whether:

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
>
> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
>
> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.

T.C.A. § 40-35-103 (2006).

The trial court based its order of confinement on its finding that measures less restrictive than confinement have frequently and recently been applied unsuccessfully to the Defendant: "Even on this program I've made him serve a year. He gets out, and he continues to fail." The court continued, saying that releasing the Defendant so he could enter the Samaritan house was not

"appropriate." Moreover, the trial court stated that it "released him one time before to show back up to serve a sentence, and it just didn't happen," referring to the Defendant's failure to surrender himself to custody. The trial court also stated that the Defendant had "a long history of criminal conduct." As a result, it ordered the Defendant to serve his sentence in TDOC. We agree with these conclusions of the trial court.

The Defendant argues that the trial court erred when it enhanced his sentence based on its finding that the Defendant led others in the commission of a crime. He also argues that the trial court improperly weighed the enhancement and mitigating factors when it ordered him to serve a sixteen-year sentence.

When the trial court re-sentenced the Defendant at the hearing, it found four enhancement factors and one mitigating factor applied to the Defendant's case:

> One, and that there's a previous history of criminal convictions or behavior in addition to those necessary to establish the appropriate range. And that would be because of the prior attempted robbery. There are other misdemeanor convictions off and on.
>
> On the – factor number two [that the Defendant was a leader in the commission of the offense] would apply to the 2004-D-2545 [case] because there was more than one actor in that. That would apply.
>
> Factor number thirteen [that the Defendant committed a felony while on a judicially ordered release], that only is going to apply to [case 2004-B-]1436. And since that can't be enhanced, that really doesn't matter.
>
> Factor number eight [that the Defendant has failed to comply with the conditions of being released into the community], however, applies to all of them. That is he failed to comply with – he's previously failed to comply with the sentence involving release into the community. And that would be on his prior conviction of the attempted robbery. . . .
>
> Mitigating factors would be that his conduct neither caused nor threatened serious bodily injury.

The trial court then ordered the Defendant to serve a sixteen-year sentence as a Range II multiple offender by lengthening the sentence for case 2004-D-2545 from eight years to ten years. The trial

court had previously sentenced the Defendant to serve six years for case 2004-B-1436.

The trial court explained at the re-sentencing hearing that it enhanced the Defendant's sentence with respect to case 2004-D-2545 because the Defendant led another person in possessing .5 grams or more of cocaine with the intent to sell it. The Defendant argues that the trial court erred because this was a re-sentencing hearing, and "[t]he facts underlying this factor stem from the prior conviction, not the appellant's current violation." The Defendant admitted during his testimony that he and another person sold cocaine to undercover police officers. Given that the Defendant admitted to holding the "bulk of the drugs" while he and another person possessed .5 grams or more of cocaine with the intent to sell it, the trial court correctly applied the enhancement factor that the Defendant was a leader of the criminal conduct. The trial court cited that it used facts of case 2004-D-2545, which was one of the judgments at issue in this revocation and re-sentencing hearing. The trial court did not use facts from the Defendant's prior convictions. The Defendant is not entitled to relief on this issue.

Additionally, we conclude that the trial court correctly weighed the enhancement and mitigating factors when it re-sentenced the Defendant. The Defendant was originally sentenced, pursuant to a plea agreement, to an agreed sentence of eight years to be served in community corrections. The trial court re-sentenced the Defendant to ten years for case 2004-D-2545, which involved a Class B felony. T.C.A. § 39-17-417(c)(1) (2003). The sentencing range for a Range I, Class B felony was from eight to twelve years. T.C.A. § 40-35-112(a)(2) (2003). The trial court found and applied the following enhancement factors: (1) the Defendant's prior criminal record; (2) the Defendant's leadership in the offense; and (3) the Defendant's previous failures to comply with the terms of his release into the community. It then applied the mitigating factor that the Defendant's actions did not cause or threaten serious bodily harm. After considering those factors, it re-sentenced the Defendant to ten years, which is within the statutory sentencing range for the Defendant's offense. The trial court properly re-sentenced the Defendant, and the Defendant is not entitled to relief on this issue.

III. Conclusion

After a thorough review of the record and the applicable law, we conclude the trial court properly sentenced the Defendant. As such, we affirm the trial court's judgments.

ROBERT W. WEDEMEYER, JUDGE